

Decision PROPOSED DECISION OF ALJ MILES (Mailed 9/12/2022)

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Application of Etheric Communications, LLC for a Certificate of Public Convenience and Necessity to Provide Full Facilities-Based and Resold Competitive Local Exchange and Non-Dominant Interexchange Service and Designation as an Eligible Telecommunications Carrier in California.

Application 21-01-002

**DECISION GRANTING ETHERIC A CERTIFICATE OF PUBLIC  
CONVENIENCE AND NECESSITY IN ORDER TO PROVIDE FULL  
FACILITIES-BASED AND RESOLD COMPETITIVE LOCAL EXCHANGE  
SERVICES AND RESOLD INTEREXCHANGE SERVICES BUT DENYING  
DESIGNATION AS AN ELIGIBLE TELECOMMUNICATIONS CARRIER**

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**Summary**

Pursuant to Public Utilities Code § 1001, we grant Etheric Communications, LLC a certificate of public convenience and necessity to provide full facilities-based and resold competitive local exchange services and resold interexchange services subject to the terms and conditions set forth in the Ordering Paragraphs. We deny Etheric's request for designation as an Eligible Telecommunications Carrier in California, at this time.

Application 21-01-002 is closed.

**1. Background**

On January 5, 2021, Etheric Communications, LLC (Etheric)<sup>1</sup> filed this application for a certificate of public convenience and necessity (CPCN) to operate as a competitive local exchange carrier in the territories currently served by AT&T California, Frontier California, Inc., Consolidated Communications of California Company, and Citizens Telecommunications Company of California d/b/a Frontier Communications of California, Inc., and as a non-dominant interexchange carrier (NDIEC) in the entire State of California. Etheric is concurrently seeking designation as an Eligible Telecommunications Carrier (ETC).

<sup>1</sup> Etheric is a California limited liability company which is wholly owned by Etheric Networks, Inc. Etheric's principal place of business is located at 1009 S. Claremont Street, San Mateo CA 94402.

Etheric is wholly owned by its parent company, Etheric Networks, Inc. Etheric proposes to provide voice and broadband to residential and small business customers using services and facilities of other carriers or its own facilities, such as fiber optic cable and associated electronics, fixed wireless facilities, switches, and routers. Etheric will install or utilize facilities in or on existing structures. Etheric describes itself as a fixed-wireless broadband and internet service provider (ISP). Its parent company, Etheric Networks, Inc. represents that it has built, maintained and grown a fixed wireless network that covers over 10,000 square miles in the San Francisco Bay Area with a mix of long, medium and short range licensed and unlicensed fixed wireless.

### **1.1. Procedural Background**

A prehearing conference was held on March 2, 2021, to determine the issues of law and fact, determine the need for hearing, set the schedule for resolving the matter and address other matters, as necessary. No protests or responses were filed with respect to the application.

The assigned Commissioner issued a Scoping Memorandum and Ruling on April 7, 2021.

On April 19, 2021, Etheric filed supplemental information in response to the assigned Administrative Law Judge (ALJ) ruling dated March 22, 2021, which requested additional information.

On July 28, 2021, Etheric filed additional information in response to the ALJ ruling dated May 17, 2021, which required audited financial information.

On September 24, 2021, Etheric filed a response to the ALJ ruling dated September 24, 2021, which requested certain information about Etheric's responses to the FCC.

On December 12, 2021, counsel for Etheric uploaded (via the California Public Utilities Commission's (Commission) secure document transfer platform) numerous documents to Communications Division (CD) in response to a data request from CD. By Decision (D.) 22-05-025 an extension of the statutory deadline was granted to October 20, 2022, to permit CD staff to thoroughly rereview the application, to allow the ALJ sufficient time to draft a proposed decision, to provide CD staff and the assigned Commissioner adequate opportunity to review the Proposed Decision (PD), and to give the Commission sufficient time thereafter to deliberate and to issue its final decision.

The Proposed Decision was issued on September 12, 2022. On October 24, 2022, Etheric filed a Motion to Set Aside Submission and requested leave to file additional documentation in support of its application, that Etheric received subsequent to submission and issuance of the Proposed Decision. On November 2, 2022, the record was reopened for the purpose of receiving into the record, correspondence that Etheric received from the Federal Communication Commission, as well as other documents that Etheric tendered to the Commission in support of its Application.

The record was closed and the proceeding deemed submitted as of November 3, 2022.

## **2. Jurisdiction**

Public Utilities Code (Pub. Util. Code) § 216(a) defines the term "Public ~~utility~~Utility" to include a "telephone corporation," which in turn is defined in Public Utilities Code § 234(a) as "every corporation or person owning, controlling, operating, or managing any telephone line for compensation within this state."

Etheric is a telephone corporation and a public utility subject to our jurisdiction.

Etheric represents that it will offer Session Initiation Protocol (SIP) based Voice over Internet Protocol (VoIP) standalone service with unlimited local and domestic calling included.<sup>2</sup>

### **2.1. Commission Authority to Designate Eligible Telecommunications Carrier in California**

The Commission has authority to grant requests for designation of ETC status, pursuant to Resolution (Res.) T-17002; and in accordance with the federal delegation of authority set forth in the Communications Act in 47 United States Code (U.S.C.) § 214, which states in part: A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph [214(e)] (1) as an ETC for a service area designated by the State commission. In order to request ETC status, the applicant must hold a CPCN. Etheric is requesting both a CPCN as well as ETC status in the instant application. This limited process was made available to Rural Digital Opportunity Fund (RDOF) Phase I recipients to facilitate quicker review of ETC designation requests.

### **3. California Environmental Quality Act (CEQA)**

Pursuant to CEQA and Rule 2.4<sup>3</sup> of the Commission's Rules of Practice and Procedure, the Commission examines projects to determine any potential environmental impacts in order that adverse effects are avoided and environmental quality is restored or enhanced to the fullest extent possible under CEQA.

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<sup>2</sup> See Application at 15.

<sup>3</sup> Unless otherwise noted, items labeled "Rule" are from the Commission's Rules of Practice and Procedure.

According to the application, Etheric's proposed activities will utilize both facilities obtained from other carriers and facilities it constructs. Etheric will undertake relatively minor ground-disturbing activities, including placement of fiber optic facilities in aerial and underground conduit configurations, installation or replacement of utility poles or conduit, installation in underground vaults, trenching, boring and grading. Etheric anticipates that construction will take place inside public rights of way, and occasionally, on private property in existing easements.<sup>4</sup>

These activities fall within the following classes of projects that are exempt from CEQA and for which neither an Environmental Impact Report nor a Negative Declaration is required.

- Class 1 Exemption: operation, repair, maintenance, leasing or minor alteration of existing public or private structures and facilities, with negligible or no expansion of an existing use. This includes existing facilities used to provide public utility services. (14 CCR § 15301.)
- Class 3 Exemption: construction including water main, sewage, electrical, gas and *other utility extensions of reasonable length* to serve such construction. This includes the construction of limited numbers of new small facilities or utility extensions. (14 CCR § 15303.)

Etheric's proposed activities involve construction of reasonably short utility extensions (Class 3). Exemption of these activities is consistent with Commission precedent. Etheric's proposed new construction activities are similar to those undertaken by other carriers that we have decided are categorically exempt from CEQA. (*See, e.g., D.06-04-063 (ClearLinx Network Corporation)*); *D.06-04-067 (CACLEC LLC)*).

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<sup>4</sup> See Application at 5.

Etheric does not yet have detailed deployment plans but requests approval to utilize a procedure for expedited review of its projects once it has identified specific site(s) in which it plans construction.<sup>5</sup> The proposed procedure tracks the expedited review procedure that we have approved for other carriers. Such a process will expedite CEQA review and is appropriate for the type of construction outlined here, which will be categorically exempt. By establishing this expedited review process, we are able to review the information on a specific project to confirm that it is categorically exempt from CEQA or to explain why further environmental review is required. At the same time, the proposed CEQA review process will enable Etheric to undertake construction of its projects in an efficient manner without experiencing delays caused by an unnecessarily protracted CEQA review.

Similar to the procedure approved for other carriers, the following procedure will be used to obtain Commission approval of Etheric's claimed CEQA exemptions for proposed construction projects:

- Etheric will provide the Commission's Energy Division with:
  - A detailed description of the proposed project, including:
    - Customer(s) to be served;
    - The precise location of the proposed construction project; and
    - Regional and local site maps.
  - A description of the environmental setting, to include at a minimum:
    - Cultural, historical, and paleontological resources;
    - Biological resources; and

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<sup>5</sup> Application at 6.



- Current land use and zoning.
- A construction workplan, to include:
  - Commission Preconstruction Survey Checklist-Archaeological Resources;
  - Commission Preconstruction Survey Checklist-Biological Resources;
  - A detailed schedule of construction activities, including site restoration activities;
  - A description of construction/installation techniques;
  - A list of other agencies contacted with respect to siting, land use planning, and environmental resource issues, including contact information; and
- A list of permits required for the proposed project.
- A statement of the CEQA exemption(s) applicable to the proposed project; and
- Documentation and factual evidence sufficient to support a finding that the claimed exemption(s) is (are) applicable.
- The Energy Division will review Etheric's submission for the proposed project to confirm that the claimed exemption(s) from CEQA are applicable.
- Within 21 days from the date of Etheric's submittal, the Energy Division will issue either:
  - A Notice to Proceed (NTP) and file a Notice of Exemption with the State Clearinghouse, Office of Planning and Research, or
  - A letter of denial stating the specific reasons why the claimed exemption(s) are not applicable to the proposed project.

We have reviewed the application and Supplement and find that:

- Etheric's proposed facilities-based project activities are very limited;

- These activities would in almost all circumstances be very likely to qualify for an exemption from CEQA; and
- The proposed process for reviewing the applicability of CEQA exemptions to Etheric's facilities-based projects is not only adequate for the Commission's purposes as CEQA Lead Agency, but is also in the public interest because it enables Etheric to respond in a timely manner to requests for service without the delay or burden of a full CEQA review when such review is unnecessary.

We therefore approve Etheric's proposed process for Commission review of claimed CEQA exemptions for construction projects undertaken pursuant to Etheric's full facilities-based authority, based on the specific facts of this case with the following modifications related to the Commission's Energy Division review and approval or disapproval of the proposed exemptions.

If the Energy Division disapproves Etheric's claimed CEQA exemption(s) and issues a letter of denial to Etheric, Etheric must either re-design the specific project and facilities and then reapply for a finding of exemption from CEQA, or file a formal application with the Commission seeking the requisite approval and full CEQA review, before commencing any construction activities.

Etheric shall not perform any full facilities-based construction activities without first obtaining an NTP from the Energy Division or authorization by the Commission after the requisite environmental review.

We have previously determined that the public convenience and necessity require that competition be allowed in the provision of competitive local exchange service, Rulemaking (R.) 95-04-043/Investigation (I.) 95-04-044. Granting this application will benefit the public interest by expanding the availability of technologically advanced telecommunications services within the state.

#### 4. Financial Qualifications

To be granted a CPCN, an applicant for authority to provide full facilities--based and resold competitive local exchange services and resold interexchange services must demonstrate that it has a minimum of \$100,000 cash or cash equivalent, reasonably liquid and readily available to meet the firm's start-up expenses.<sup>6</sup> In the application, Etheric provided documentation that it has \$100,000.<sup>7</sup> Since Etheric has provided documentation that it possesses a minimum of \$100,000 that is reasonably liquid and available, it has demonstrated that it has sufficient funds to meet its start-up expenses and has fulfilled this requirement. Etheric's financial documentation will be subject to verification and review by the Commission for one year to ensure that such funds are available.

In addition to demonstrating financial fitness, Etheric must also demonstrate that an additional amount equal to the deposit required by AT&T California, Frontier California, Frontier Communications, and Consolidated Communications is available to Etheric for one year following certification.<sup>8</sup> Etheric proposes to initially interconnect with AT&T California, Frontier California, Frontier Communications, and Consolidated Communications. Etheric indicates that it has not yet negotiated agreements with the carriers to purchase services, however, it anticipates that the deposit requirement will be no

<sup>6</sup> The financial requirement for Competitive Local Exchange Carriers (CLEC) is contained in D.95-12-056, Appendix C. The financial requirement for Non-Dominant Interexchange Carriers (NDIEC) is contained in D.91-10-041.

<sup>7</sup> See Application at 9. Etheric provided documentation in confidential Exhibits G & H.

<sup>8</sup> The requirement for Competitive Local Carrier (CLC) applicants to demonstrate that they have additional financial resources to meet any deposits required by underlying Local Exchange Carriers (LEC) and/or IECs is set forth in D.95-12-056, Appendix C. For NDIECs, the requirement is found in D.93-05-010.

more than \$10,000, and that its financials demonstrate that Etheric's cash and assets are sufficient to post the necessary deposits.<sup>9</sup>

Etheric also represents that it will obtain and submit to the Commission a continuous performance bond in the amount of \$25,000 issued by a corporate surety company authorized to transact surety business in California, as required by D.13-05-035. Etheric will obtain such a bond, with the Commission listed as an obligee on the bond and will submit it to the Commission within five days of accepting its CPCN authority.<sup>10</sup>

## **5. Technical Qualifications**

To be granted a CPCN for authority to provide competitive local exchange and interexchange service, an applicant must make a reasonable showing of managerial and technical expertise in telecommunications or a related business.<sup>11</sup> Etheric supplied biographical information on its management in Exhibit J to its application that demonstrates it has sufficient expertise and training to operate as a telecommunications provider.

In its application,<sup>12</sup> Etheric verified that no one associated with or employed by Etheric as an affiliate, officer, director, partner, or owner of more than 10 percent of Etheric, or anyone acting in a management capacity for Etheric:

(a) held one of these positions with a company that filed for bankruptcy; (b) been personally found liable, or held one of these positions with a company that has been found liable, for

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<sup>9</sup> See Application at 9.

<sup>10</sup> See Application at 12.

<sup>11</sup> D.95-12-056 at Appendix C, Rule 4.A.

<sup>12</sup> See Application at 59-60, "Sworn Affidavit of William Alexander Hagen, Chief Executive Officer of Etheric.

fraud, dishonesty, failure to disclose, or misrepresentations to consumers or others; (c) been convicted of a felony; (d) been (to his/her knowledge) the subject of a criminal referral by judge or public agency; (e) had a telecommunications license or operating authority denied, suspended, revoked, or limited in any jurisdiction; (f) personally entered into a settlement, or held one of these positions with a company that has entered into settlement of criminal or civil claims involving violations of §§ 17000 *et seq.*, §§ 17200 *et seq.*, or §§ 17500 *et seq.* of the California Business & Professions Code, or of any other statute, regulation, or decisional law relating to fraud, dishonesty, failure to disclose, or misrepresentations to consumers or others; or (g) been found to have violated any statute, law, or rule pertaining to public utilities or other regulated industries; or (h) entered into any settlement agreements or made any voluntary payments or agreed to any other type of monetary forfeitures in resolution of any action by any regulatory body, agency, or attorney general.<sup>13</sup>

Also, to the best of Etheric's knowledge, neither Etheric, or any affiliate, officer, director, partner, nor owner of more than 10% of Etheric, or any person acting in such capacity whether or not formally appointed, is being, or has been investigated by the Federal Communications Commission (FCC) or any law enforcement or regulatory agency for failure to comply with any law, rule or order.<sup>14</sup> For the above reasons, we find that Etheric is in compliance with the requirements of D.13-05-035.

## **6. Tariffs**

Etheric has requested detariffed status and may be exempt from the requirement to file tariffs provided that Etheric complies with the consumer

<sup>13</sup> These certifications are required by D.13-05-035, Ordering Paragraph 14.

<sup>14</sup> *Id.*

protection rules identified in D.98-08-031. Etheric states that it plans to offer services on a non-discriminatory basis as well as individual case basis contracts.

Detariffed status is not available for carriers providing residential local exchange service. Based on the application, it does not appear that Etheric intends to provide residential local exchange service at this time. Pursuant to D.12-12-038, Appendix A, Section II, parts a and b, basic service must be tariffed or scheduled. In the future, if Etheric decides to offer services that require a tariff or schedule, such as basic service, Etheric must submit proposed tariffs and/or user guides to the Communications Division via Tier 2 Advice Letters using the General Order (GO) 96-B advice letter process at least 30 days before initiation of service.

## **7. Map of Service Territory**

To be granted a CPCN for authority to provide competitive local exchange service, an applicant must provide a map of the service territories it proposes to serve.<sup>15</sup> Etheric provided a map of the location of its proposed service territory, in compliance with this requirement.<sup>16</sup>

## **8. Rule 3.1(i) Statement**

Rule 3.1(i) sets forth the requirement that a utility filing an application under Pub. Util. Code § 1001, provide a statement regarding GO 104-A, Section 2. Etheric states that it is not aware of any reportable matters pursuant to General Order 104-A, Section 2. Etheric, therefore, has nothing to report under this rule.<sup>17</sup>

<sup>15</sup> D.95-12-056 at Appendix C, Rule 4.F.

<sup>16</sup> See Application, Exhibit E.

<sup>17</sup> See Application at 10.

## **9. Expected Customer Base**

Etheric provides its estimated customer base for the first and fifth years of operation in its confidential Exhibit I to its application. Therefore, Etheric has complied with this requirement.

## **10. Safety Considerations**

With the adoption of the *Safety Policy Statement of the California Public Utilities Commission* on July 10, 2014, the Commission has, among other things, heightened its focus on the potential safety implications of every proceeding. We have considered the potential safety implications here. The Commission is satisfied that Etheric will meet the Commission's minimum safety goals and expectations of competitive local exchange carriers (CLECs) because: (1) Etheric has taken steps to meet the financial requirements as set forth in this decision for a facilities-based CLEC, and (2) Etheric is a public utility that is required pursuant to Pub. Util. Code § 451 to "... furnish and maintain such adequate, efficient, just and reasonable service, instrumentalities, equipment, and facilities, including telephone facilities ... as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public."

## **11. Request for Treatment as a Non-Dominant Interexchange Carrier**

Applicant requests treatment as a nondominant interexchange carrier (NDIEC)-, which would include exemption from the requirements of Pub. Util. Code §§ 816-830 concerning stocks and security. Applicant also requests an exemption from Pub. Util. Code § 851 solely for the transfer and encumbrance of utility property in order to secure debt. The Commission detailed its rules regarding exemption of NDIECs in D.85-01-008, and subsequently modified in D.85-07-081 and D.85-11-044. Pursuant to D.85-07-081 and D.85-11-044 (addressing NDIECs) and D.97-01-015 (addressing CLECs), NDIECs and CLECs

are exempt from Pub. Util. Code § 851 for the sole purpose of the transfer or encumbrance of utility assets to secure debt.

### **11.1. Treatment as a NDIEC Granted**

Etheric meets the financial and technical requirements to obtain a CPCN. Therefore, we grant Applicant's request for NDIEC- status, which provides an exemption from Pub. Util. Code §§ 816-830 concerning stocks and security, provided Applicant follows all rules detailed in the above referenced decisions. We also grant Applicant's request for exemption from Pub. Util. Code § 851 for the sole purpose of securing debt pursuant to the decisions referenced above.

## **12. Request for Designation As An Eligible Telecommunications Carrier**

On February 7, 2020, the FCC adopted the Rural Digital Opportunity Fund (RDOF) program to build broadband in rural and unserved/underserved communities.<sup>18</sup> The RDOF program has a budget of \$20.4 billion over 10 years to support infrastructure with minimum broadband speeds of 25/3

~~megabytes~~megabits per second (mbps). The RDOF program is awarding funding in two phases – Phase I targets unserved communities, and Phase II will target partially served communities.<sup>19</sup>

On December 7, 2020, the FCC issued a Public Notice announcing the winning bidders for the RDOF Phase I Auction 904. There were 180 winning bidders nationwide in Auction 904. The award amount totals \$9.23 billion over a 10-year period, with 5,220,833 locations covering 49 states and one territory. Over 99.7% of locations in Auction 904 areas have bidders providing download

<sup>18</sup> See *In the Matter of Rural Digital Opportunity Fund, Connect America Fund*, Report and Order, WC Dkts. 19-126 & 10-90, (FCC 20-5), released February 7, 2020.

<sup>19</sup> *Id.*, at 3.



speeds of at least 100 mbps.<sup>20</sup> There were 15 companies in California provisionally awarded Phase I amounts totaling \$695 million.<sup>21</sup>

The FCC will also provide oversight of the projects whereby bidders are subject to penalties or forfeiture if they do not meet service milestones.<sup>22</sup> Bidders must meet certain deployment obligations to receive RDOF support. For example, carriers must commercially offer voice and broadband services to 40% of the locations receiving RDOF support within each state, as applicable, by the end of the three-year funding cycle, and then 20% of the locations each year thereafter until reaching 100%.<sup>23</sup> Winning RDOF bidders must obtain an ETC designation in the state(s) where ~~it seeks~~they seek support to receive federal funding.

Etheric is among the 15 bidders that provisionally won RDOF awards in California. Etheric must satisfy all federal and state ETC requirements to receive an ETC designation. For RDOF, Etheric proposes to use a combination of fixed wireless ~~access~~and fiber optic network technologies to satisfy the Gigabit speed tier requirement as mandated by the FCC in Auction 904.<sup>24</sup>

Section 254 of the Communications Act (the Act), as amended, states that “only an eligible telecommunications carrier under section 214(e) shall be eligible to receive specific federal universal service support.”

<sup>20</sup> See *Rural Digital Opportunity Fund Phase I Auction (Auction 904) Closes, Winning Bidders Announced*, Public Notice, AU Dkt. 20-34, WC Dkts. 19-126 & 10-90, (DA 20-1422), released December 7, 2020.

<sup>21</sup> *Id.*, Attachment B.

<sup>22</sup> RDOF Order, paras. 45-55.

<sup>23</sup> RDOF Order, para. 45.

<sup>24</sup> See *Rural Digital Opportunity Fund Phase I Auction (Auction 904) Closes, Winning Bidders Announced*, Public Notice, AU Dkt. 20-34, WC Dkts. 19-126 & 10-90, (DA 20-1422), released December 7, 2020.

The Act gives state commissions the primary responsibility for granting ETC designation to companies operating in their states. Section 214(e)(2) states that, “[u]pon request and consistent with the public interest, convenience, and necessity, the state commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the state commission” so long as the requesting carrier meets the requirements of Section 214(e)(1).

In addition to meeting the public interest standard, the FCC rules require that a carrier requesting ETC designation must:

1. Certify that it will comply with the service requirements applicable to the support that it receives;
2. Submit a five-year plan that describes proposed improvements or upgrades to the applicant’s network throughout its proposed service area;
3. Demonstrate its ability to remain functional in emergency situations;
4. Demonstrate that it will satisfy applicable consumer and service quality standards;
5. Demonstrate that it is financially and technically capable of providing the federal Lifeline service; and
6. Submit information describing the terms and conditions of any voice telephone service plans offered to federal Lifeline participants.<sup>25</sup>

The Commission also adopted procedures and guidelines for processing ETC applications. In Resolution T-17002 (May 25, 2006), the Commission adopted The Comprehensive Procedures and Guidelines for ETC Designation and

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<sup>25</sup> 47 C.F.R. § 54.202(a).

Requirements for ETCs that are consistent with FCC Universal Service Order 97-157<sup>26</sup> regarding designation of a telephone carrier as a qualified ETC.

Pursuant to this Resolution, applicants seeking ETC designation in California are required to provide the following:

1. A description of the proposed service offerings and attached service area maps;
2. A description of the advertising plan(s);
3. A statement of commitment to provide service;
4. Submission of the 2-year service quality improvement plan;
5. A showing of the ability to remain functional;
6. A statement of commitment to consumer protection;
7. Demonstration that a carrier's usage plan is comparable to that of the incumbent LEC in the proposed service area; and
8. A public interest determination.

In addition to Resolution T-17002 ETC designation rules, carriers requesting ETC designation to offer federal and or state Lifeline services, must also comply with General Order (GO) 153, and the Commission's User Fee and surcharge obligations. The Commission's User Fee is levied on all telecommunications carriers providing services directly to customers and the amount of fees are calculated based on a percentage of all intrastate customer billings for telecommunications services. All telecommunications carriers and Voice over Internet Protocol (VoIP) providers are also required to collect and remit public purpose program surcharges from end-users. These surcharges fund the Commission's universal service programs.

<sup>26</sup> See *In the Matter of Federal-State Joint Board on Universal Service*, Report and Order, CC Dkt. ~~96-45~~96-45 (FCC 97-157), released May 8, 1997 (FCC Report and Order).

In evaluating an applicant for ETC designation, the Commission ensures all public support received, whether from the state or federal government, is used for the purpose for which the support is given. As part of this evaluation, an applicant must demonstrate that it has the commitment and ability to provide the services supported by the federal universal service mechanism.<sup>27</sup> As noted above, in addition to evaluating whether an applicant is capable of sustaining operations and supported services, the Commission also must determine that an ETC designation is in the public interest.<sup>28</sup> Public interest determination is guided by the purposes of the Communications Act itself, including the fundamental goals of preserving and advancing universal service; ensuring the availability of quality telecommunications services at just, reasonable, and affordable rates; and promoting the deployment of advanced telecommunications and information services to all regions of the nation, including rural and high-cost areas.<sup>29</sup> The Commission also looks to whether the designation will increase consumer choices, the advantages and disadvantages of its service. Etheric bears the burden of proof to demonstrate it meets these criteria.

### **12.1. Designation as an Eligible Telecommunications Carrier Not Granted**

<sup>27</sup> 47 U.S.C. § 214(e)(1); 47 C.F.R. 54.201; Report and Order, paras. 7, 21-24; CPUC Resolution T-17002, [at](#) pp. 2-3, Appendix A, Section II.

<sup>28</sup> 47 U.S.C. § 214(e)(2); Report and Order, paras. 40-43; 47 C.F.R. 54.201(c); Res. T-17002, [at](#) p. 7, App. A Section II(G).

<sup>29</sup> Report and Order, para. 40; Res. T-17002, [at](#) p. 1-2 (finding the additional FCC mandatory requirements for ETC designation and ETC eligibility reasonable as it provides a means to monitor and ensure that any funds given to California ETCs are used to achieve the goals of universal service.).

Both the ALJ and staff conducted a due diligence review of the Application, public and confidential exhibits, and supplemental responses to Staff's requests for information to determine Etheric's financial capabilities, technical and operational capabilities, and customer protection. After considering staff's analysis we find that Etheric's submissions call into question its fitness to be granted ETC designation to serve California consumers. Etheric failed to demonstrate its ability to provide the services supported by the federal RDOF fund, the basis for its ETC designation request. Although Etheric meets the financial and technical requirements to obtain a CPCN, after review, we have determined that approving an ETC for Etheric is not in the public interest. We find that Etheric does not meet the substantial operational, financial, and technical capabilities required to construct and operate a broadband and voice telecommunications network serving up to 64,463<sup>30</sup> new locations over a large area of the state comprising 25 counties. Moreover, absent ~~additional~~concrete financial surety, Etheric did not demonstrate that the RDOF award of \$248,634,963 is sufficient to ensure the network will be built and operated as

<sup>30</sup> 64,463 is the number of RDOF locations in Etheric's winning bid announced by the FCC in the Public Notice of 12/07/2020. However, in an Ex Parte filing of May 19, 2022, the applicant included a letter of support signed by an officer of a commercial credit firm which stated Etheric "plans to provide high-speed broadband service for up to 51,00 locations in California." The support letter gives no explanation for this difference of more than 13,000 locations. Staff believes a possible reason for this difference is a reduction in the winning bid locations for Etheric because of the FCC's post-auction assessment that tens of thousands of RDOF winning bid locations nationally were not actually eligible for the program. FCC staff sent letters to 197 winning bidders, including Etheric, on July 26, 2021, which listed the bidders' "census blocks covered by winning bids" in which concerns were raised about possible ineligible locations. The FCC staff letter to Etheric listed an estimated 464 such census blocks. See: J. Engebretson (July 26, 2020) *FCC Ready to Authorize 48 RDOF Winning Bidders, Releases List of Defaults, Telecompetitor*; and: Letter of M. Janson, K. Monteith. G. McHenry, FCC to Etheric Communications LLC, July 26, 2021, linked from: *Rural Digital Opportunity Fund Auction Support for 1,460 Winning Bids Ready to be Authorized*; Public Notice, DA 21-909, Rel. July 26, 2021.

required by the FCC. Given these considerations, we deny Etheric's request for an ETC designation, at this time, for the following reasons:

1) Operational Capability

We find that Etheric is not operationally capable of scaling its business size to build a network capable of providing voice and gigabit-capable service to 64,463 locations, in line with RDOF build requirements.<sup>31</sup> Most of Etheric's current network is in nine Bay Area counties and the proposed buildout would be ~~in~~ across twenty-five counties, including rural counties, which are widely dispersed throughout the state far from Etheric's current infrastructure.<sup>32</sup> ~~Based on public information, we find the company has no current networks or subscribers in a majority of those counties~~ In filed comments, Etheric asserts that its existing infrastructure is adjacent to 40% of the RDOF locations. However, we cannot verify this information based on a diagram of a map submitted.<sup>33</sup> Etheric made assumptions about build costs that we cannot verify or are unreasonable given their current subscriber rates. Etheric's proposed buildout ~~would therefore amount to a~~ requires substantial increase over its ~~present customer base~~ current scope of operations. We find that this scale of increase is not feasible given the present size of the Etheric service area, ~~its management, or its operating capabilities~~ size of its operations and revenue expectations. Furthermore, contingency promises are too remote to support a final decision granting an ETC.

<sup>31</sup> FCC RDOF Rules are summarized here: <https://www.fcc.gov/auction/904/factsheet>.

<sup>32</sup> Etheric's proposed RDOF network buildout may be seen and analyzed by area via the CPUC's RDOF Map: <https://www.broadbandmap.ca.gov/federal/funding/>

<sup>33</sup> ~~Based on the company's website, staff estimates Etheric now operates in the 9 counties of Alameda, Contra Costa, Marin, Monterey, San Benito, San Francisco, San Mateo, Santa Clara, and Santa Cruz Counties. (See: <https://ethericnetworks.com/>.)~~<sup>33</sup> Etheric Communications Opening Comments at 2 and confidential attachment I.

As an example, we note that the applicant placed on the record a ~~letter from the CEO of~~ Scope of Work (SOW) and a Master Services Agreement (MSA) with a well-recognized telecommunications network construction and engineering firm, Tilson Technology Management, headquartered in Portland, Maine.<sup>34</sup> ~~The letter does not speak to any specific contractual arrangements, agreements, or the like to~~ These documents do not provide any identified design, engineering, or construction services in support of Etheric's proposed RDOF network in California.

Irrespective of Tilson's national reputation, the documents do not specify a plan for additional resources, or operational capacity to actually manage such an aggressive buildout. The core issue of Etheric's proposed geometric increase of scope of operations in California has not been sufficiently addressed.

## 2) Financial Capability

We find that Etheric is not financially capable of building a network capable of providing voice and gigabit speed broadband to 64,463 locations. Etheric proposes to use a mix of optical fiber and fixed wireless technology to satisfy its RDOF build requirements to make broadband and voice services available to these new locations within the timeframe established by the RDOF rules. We note that, in an Ex Parte filing of May 19, 2022, Etheric submitted a letter of support dated May 11, 2022, from the Managing Director of the commercial credit subsidiary of the private equity firm Summit Partners (Summit). While the letter stated that the firm conducted due diligence to support Etheric's CPCN /ETC application before this Commission, it made no

<sup>34</sup> ~~ExParte Communications~~ Expedited Motion of Etheric Communications, LLC, ~~in CPUC A.21-01-002;~~ To Set Aside Submission and Reopen the Record for the Purpose of Admitting Evidence into the Record. 04/20/2022



statement that a commercial credit facility or private equity financing was pledged to support either Etheric's proposed RDOF-subsidized project or the company in general. In fact, the letter's single footnote states, "While Summit is very excited about this opportunity, this letter is not, and cannot be relied upon by you or any third party as a binding commitment or other agreement to provide any financing or consummate the Facility."<sup>35</sup>

~~As in the case of other~~ ETC applicants are required to show financial capability to provide the supported services. Other RDOF Phase I (AU 904) winning bidders in California, ~~the Commission needs~~ have met this showing by providing documented evidence of financial surety sufficient to cover the gap between the cost of building and operating the network partially funded by RDOF ~~and the 10-year RDOF award. To repeat, continued~~<sup>36</sup> Continued contingencies and statements about possible securing of financial support in the form of capital investment, or commercial credit are not sufficient.

On November 2, 2022, an ALJ Ruling reopened the record of the proceeding to allow Etheric to place a large volume of documents on the record. Commission staff reviewed updated documents from Summit placed on the record. This included one letter with no date or signature that was included in Etheric's filed comments on October 3, 2022,<sup>37</sup> and two letters filed in the

<sup>35</sup> See Ex Parte Communications by Etheric Communications, dated May 19, 2022. Ex Parte communications are not evidence that the Commission relies upon in reaching a determination. However, we note that Etheric's recent Ex Parte filing, which included a statement from Summit Partners, does not provide any indication that there is financial surety to guarantee any revenue shortfalls or unanticipated costs in Etheric's financial planning for its California RDOF network. In fact, Summit Partner's letter explicitly suggests that this is not the case.

<sup>36</sup> D.22-04-008 at 18 and FoF 16.

<sup>37</sup> Etheric Communications Opening Comments filed October 3, 2022, Confidential Attachment C.



Emergency Motion to Reopen the Record, one was dated May 11, 2022,<sup>38</sup> and signed by Summit Partners, and the other dated October 11, 2022.<sup>39</sup> All three letters did not provide a firm commitment of funding to cover the gap between the cost of building and operating the network partially funded by RDOF award, as mentioned above.

While the applicant stated on the record<sup>40</sup> that Summit would clarify its position with a new documented statement confirming a substantive financial commitment to Etheric's RDOF-funded network buildout in California, the Commission finds no such documentation of a material commitment in the documentation submitted to the reopened record of this proceeding. Instead, the applicant did place on the record a statement from Summit which, like the first letter of May 11, expresses no specified financial commitment to Etheric's proposed RDOF network in California.<sup>41</sup>

Additionally, Etheric provided a summary of proposed capital expenditures/costs to build its RDOF locations.<sup>4</sup> Staff notes that the total cost to build its proposed RDOF locations is a little under the total amount of the

<sup>38</sup> Etheric Communications - Emergency Motion to Reopen the Record in A.21-01-002, filed on October 24, 2022, Confidential Exhibit 11 (Ex Parte Communication Reflecting Support from Summit Partners Credit Advisors, LP Filed on May 25, 2022.)

<sup>39</sup> Etheric Communications - Emergency Motion to Reopen the Record in A.21-01-002, filed on October 24, 2022, Confidential Exhibit 13.

<sup>40</sup> Etheric Opening Comments at 1.

<sup>41</sup> Limited Second Supplement of Etheric Communications filed October 13, 2022. The October 11, 2022 Summit Letter states: "Summit has been working with Etheric regarding potential financing for the RDOF project for more than a year. After a thorough review of Etheric's business and technical plans, Summit proposed to underwrite the project with a secured credit facility, which also includes an equity position for Summit. Due to the length of time that has passed, Summit will need to reconfirm its underwriting and finalize credit documentation, all of which will require and be contingent upon Etheric obtaining ETC designation and the Federal Communications Commission's ("FCC") issuance of a public notice approving Etheric's RDOF award."

FCC's RDOF award that was developed by Etheric more than a year ago. Total costs were also based on Etheric's network architecture that was developed during the same time last year, yet Etheric made several changes to their network architecture since that time without providing updates to their capital expenditures. Furthermore, with inflation for all consumer goods raising to 7.7% from October 2021 to October 2022,<sup>4</sup> we are convinced that inflation will also impact the total funding needed for Etheric to buildout all the required RDOF locations. As stated above, with unverified assumptions made by Etheric and the fact that we have no documented evidence with specific funding commitments, along with potential increases in the cost to build the network, we are not convinced that Etheric will have sufficient funds to carry out its RDOF responsibilities.

### 3) Technical Capability

We find that Etheric is not technically capable of providing reliable voice and gigabit speed broadband services at low latency using mostly fixed wireless technology for its last mile access network. ~~In its application to the Commission,~~ Etheric proposes to use a combination of licensed and unlicensed spectrum. ~~Despite Etheric's assurance of its technical ability, fixed~~ Fixed wireless technology generally depends on line-of-sight ~~and can be particularly spectrum constrained in unlicensed bands~~. An increase in users will require significant increases in base stations and antennas, as well as adding additional access points on residential property to support the minimum required broadband speeds. Building in mountainous, hilly, and forested rural areas will substantially increase the cost of the network to overcome the line-of-sight issue. Etheric's RDOF bid includes areas such as, among others, Inyo, Mono, and Humboldt counties. Deploying and providing gigabit broadband speeds in rural

underserved areas using a fixed wireless network is challenging, costly and time consuming.<sup>3644</sup>

Etheric asserts that it will obtain additional spectrum to support its RDOF build.<sup>45</sup> However, as stated above, future promises cannot be considered in this application and ~~is~~are an unreliable basis to determine whether the company will have sufficient resources to carry out its RDOF build.

Furthermore, because Etheric plans to customize delivery of gigabit service depending on the complexity of each location, this need to customize delivery itself may result in unplanned changes and affect both performance and cost of the service.

During September to late October 2022, Etheric submitted numerous new documents, several with numerous and detailed Exhibits<sup>46</sup> showing access (last mile) and backhaul (middle mile) network plans, which leads Commission staff to assess that Etheric issued bids in the RDOF Phase I reverse auction which were not based on a plan for the extensive network it is now proposing. Further and importantly, the eleventh-hour nature of Etheric's voluminous filings, multiple Ex Parte filings and meetings, leads us to conclude the applicant's entire approach to proposing an extensive network reaching 25 counties in the state remains reactive, rather than proactively planned, or engineered.

<sup>3644</sup> We are informed by a report published by the Benton Institute for Broadband & Society, "Fixed Wireless Technologies and Their Suitability for Broadband Delivery" by Andrew Afflerbach, Ph.D., P.E. CTC Technology & Energy, dated June 2022.

<sup>45</sup> Etheric Emergency Motion, Overall Network Design, Exhibit 7.

<sup>46</sup> As an example, the applicant submitted 28 separate Confidential Exhibits as part of its Expedited Motion of Etheric Communications, LLC To Set Aside Submission And Reopen The Record, filed October 24, 2022.

Within the most recent filings, Etheric submitted an updated 192-page FCC Detailed Technical Description that they sent to the FCC.<sup>47</sup> Etheric further asserts that the FCC's technical team vetted their technical design, but did not provide documentation supporting this claim.

Etheric also provided a test case example of San Juan Bautista, showing a recent speed test that the network can deliver over 800mbps of broadband speeds.<sup>48</sup> However, Etheric did not provide details as to when the speed test was done, how many subscribers were on the network, the time of day, all details that factor into what the real internet speeds is. It is unclear whether this was a speed test from a single event or if multiple speed tests would render the same result. Etheric has not demonstrated that it has the ability to deliver gigabit speed broadband.

#### 4) Public Interest

Section 214(e)(2) of the Communications Act states that, “[u]pon request and consistent with the public interest, convenience, and necessity, the state commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the state commission” so long as the requesting carrier meets the requirements of Section 214(e)(1). We have reviewed Etheric’s application and determined that it

<sup>47</sup> Etheric Communications - Emergency Motion to Reopen the Record in A.21-01-002, filed on October 24, 2022.

<sup>48</sup> Etheric Communications - Emergency Motion to Reopen the Record in A.21-01-002, filed on October 24, 2022, at 288 and Etheric Opening Comments at 41.

would not be in the public interest to approve their ETC designation pursuant to RDOF at this time. We have broad authority to review any ETC designation request on a case-by-case basis and grant or deny such designation after considering the local circumstances particular to each application. Based on this authority, we must take into account the ability of each applicant to carry out the RDOF build with its existing financial, technical, and operational expertise. Moving forward with an applicant that does not meet the RDOF buildout and service requirements would potentially lock-out federal and/or state funding for census geographies for years to those that are most in need of broadband access and would not be in the public interest.

Etheric also asserts in its comments that the CPUC does not have the authority to determine whether an ETC applicant has the financial capabilities to “carry out” their RDOF builds.<sup>49</sup> In March 2022, the CPUC denied two other RDOF applicants ETC designation for service area expansions.<sup>50</sup> Both applicants also contest our authority to determine an ETC designation based on financial capabilities. As evidenced in the FCC Public Notice issued on October 12, 2022, the FCC agreed with our decision and further affirms our authority provided by Section 214 (e)(2) of the Communications Act.<sup>51</sup>

### **13. Conclusions**

#### **13.1. Etheric Is Granted A CPCN**

We conclude that the application conforms to our rules for certification as a competitive local exchange and interexchange carrier. Accordingly, we grant

<sup>49</sup> Etheric Opening Comments at 14.

<sup>50</sup> See Resolutions T-17763 and T-17764.

<sup>51</sup> See FCC Public Notice, *Rural Digital Opportunity Fund Support Authorized for 1,865 Winning Bids; Bid Default Announced*, AU Dkt. 20-34, WC Dkts. 19-126 and 10-90 (DA 22-1086), released October 12, 2022, at footnote 57.

Etheric a CPCN to provide full facilities-based and resold competitive local exchange services in the service territory of AT&T California, Frontier California, Frontier Communications, and Consolidated Communications and resold interexchange services in California and broadband internet, and voice-over-internet service provider service, subject to compliance with the terms and conditions set forth in the Ordering Paragraphs.

The CPCN granted by this decision provides benefits and corresponding obligations to Etheric. Etheric receives authority to operate in the prescribed service territory, and this authority enables Etheric, pursuant to Section 251 of the 1934 Communications Act, as amended by the 1996 Telecommunications Act (47 U.S.C. § 251), to interconnect with telecommunications carriers.<sup>3752</sup> This authority also enables Etheric to obtain access to public rights-of-way subject to the CEQA requirements set forth in this decision.

In return, Etheric is obligated to comply with all Public Utilities Code provisions, Commission rules, GOs, and decisions applicable to telephone corporations providing approved services. The applicable statutes, rules, GOs, and decisions include, but are not limited to consumer protection rules, tariffing, and reporting requirements. Moreover, Etheric must pay all Commission-prescribed user fees and public purpose program surcharges as set forth in the Appendix B of this decision, to comply with CEQA, and to adhere to Pub. Util. Code § 451 which states that every public utility “...shall furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities, including telephone facilities, as defined in § 54.1 of the

<sup>3752</sup> The California Public Utilities Code uses the term “telephone corporation.” Its counterpart in federal law is a “telecommunications carrier.”

Civil Code, as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public.”

### **13.2. Etheric Is Denied Eligible Telecommunications Carrier Status**

For reasons discussed above, we decline to grant ETC status to Etheric. We have broad authority to review any ETC designation request on a case-by-case basis and grant or deny such designation after considering the local circumstances particular to each application. We have reviewed Etheric’s application and determined that it would not be in the public interest to approve their ETC designation pursuant to RDOF at this time.

### **14. Request to File Under Seal**

Pursuant to Rule 11.4 of the Commission’s Rules of Practice and Procedure, Etheric filed a January 7, 2021 motion for leave to file Exhibits F, G, H, I, J, N and V1 to the application as confidential materials under seal. Etheric also filed an April 19, 2021 motion for leave to file Exhibits A, B, C, D and E to its April 19 Response to the March 21, 2021 ALJ Ruling Requiring Supplemental Information.

Etheric represents that the information in each of the exhibits is sensitive, and disclosure could place Etheric at an unfair business disadvantage. Having reviewed the exhibits, we agree that this material should be kept confidential for three years after the date of this decision and grant the request for that period.

### **15. Categorization and Need for Hearings**

In Resolution ALJ 176-3479, dated February 11, 2021, the Commission preliminarily categorized this application as ratesetting, and preliminarily determined that hearings were necessary. There were no protests to the

application. On April 7, 2021, the assigned Commissioner issued a scoping memo stating that evidentiary hearings are not necessary.

## 16. Comments on Draft Decision

Pursuant to Rule 14.3 of the Commission's Rules of Practice and Procedure and Pub. Util. Code § 311(g)(1), the draft decision of the ALJ in this matter was mailed to the parties on September 12, 2022. Etheric filed both a Public and confidential version of Etheric's opening comments on October 3, 2022. No reply comments were filed.

We address Etheric's comments and made changes throughout the PD accordingly.

Pursuant to Rule 14.3, opening comments "shall make specific references to the record or applicable law. Comments which fail to do so will be accorded no weight." Long after the record was closed and the matter submitted, Etheric provided several attachments to both the public and confidential versions of its Opening Comments, including confidential Exhibits B, C, F, H, I, and J,~~long after the record was closed and the matter submitted.~~ It appears that Etheric seeks to provide new information by attaching documents to its Opening Comments that ~~were~~are not ~~provided during~~in the ~~pendency~~record of ~~the~~this proceeding ~~and are not in the record of A.21-01-002. This exceeds the scope of Opening Comments pursuant to Rule 14.3 and, as a result, all exhibits to the Opening Comments are stricken from the record and must be accorded no weight.~~

Staff reviewed the late-filed documents. They did not include evidence of a firm financial commitment to cover the funding gap between the amount of the federal award and the additional costs of building and operating the proposed network. Additionally, Etheric, in one of its filed Confidential Exhibits containing descriptions of its proposed RDOF network, stated that a portion of its proposed



network would be comprised of *Future Developments in the last mile* telecommunications network technologies.<sup>53</sup> The inclusion of unproven future developmental technologies in the proposed Etheric network raises the risk and that the applicant may have limited ability to provide gigabit service to their customers currently, despite the FCC requirement that Etheric deploy gigabit service commercially to at least 95% of the 64,463 locations included in their announced winning RDOF bid. Thus, the Commission's position in the proposed decision remains unchanged in the final decision: we conclude that Etheric is not entitled to an ETC designation.

~~Etheric's Opening Comments fail to show an error of fact based on the record or an error of law that would alter our assessment. The Commission's position in the proposed decision remains unchanged herein in the final decision, that the documentation filed during the pendency of the proceeding does not support granting of ETC status. Although we deny ETC designation in this decision, we do so without prejudice. If Etheric believes that the new information it seeks to provide support a different determination, we encourage Etheric to request authority for ETC status via the normal Advice Letter process. In doing so, Etheric should be mindful of meeting the criteria set out by Section 254 of the Act, the FCC rules, and the CPUC adopted procedures and guidelines in Resolution T-17002 outlined above.~~

#### **17. Motion for Confidential Treatment of Selected Opening Comments Exhibits**

As discussed above, Etheric filed a confidential version of its Opening Comments on October 3, 2022, which included confidential Exhibits B, C, F, H, I

<sup>53</sup> Etheric Communications Emergency Motion to Reopen the Record in A.21-01-002, filed October 24, 2022, at Confidential Exhibit 7, RDOF Detailed Technical Submission Response.

and J. Etheric also filed a motion requesting confidential treatment of these exhibits on October 3, 2022. Because: 1) the exhibits were provided after the record was closed and the matter submitted; and 2) pursuant to Rule 14.3, the exhibits to both the public and confidential versions of the Opening Comments are stricken from the record. The Commission denies Etheric's motion for confidential treatment of confidential Exhibits B, C, F, H, I and J to its Opening Comments. So the record is clear, the Commission also denies confidential treatment of the confidential version of Etheric's Opening Comments.

### **18. Assignment of Proceeding**

Genevieve Shiroma is the assigned Commissioner and Patricia B. Miles is the assigned ALJ in this proceeding.

### **Findings of Fact**

1. Etheric has a minimum of \$100,000 of cash or cash equivalent that is reasonably liquid and readily available to meet its start-up expenses.
2. Etheric's financials demonstrate that its cash and assets are sufficient to post deposits which may be required by other telephone carriers should Etheric need to purchase services from other carriers in order to provide services.
3. Etheric has demonstrated that its management personnel possess sufficient experience, knowledge, and technical expertise to operate as a telecommunications provider.
4. Etheric meets the requirements to be treated as a NDIEC exempt from Pub. Util. Code §§ 816-830 and § 851 for the sole purpose of the transfer or encumbrance of utility assets to secure debt.
5. Etheric is eligible for exemption from tariffing requirements provided that Etheric complies with the consumer protection rules adopted in D.13-05-035 and D.98-08-031.

6. Etheric meets the Commission's minimum safety goals and expectations of competitive local exchange carriers.

7. Etheric provided a map of the location of its proposed service territory.

8. Etheric has no information to report under Rule 3.1(i), which requires that a utility filing an application under Pub. Util. Code § 1001, provide a statement regarding compliance with GO 104-A, Section 2.

9. Etheric provided an estimate of its customer base and customer requirements for the first and fifth year of operation.

10. Pursuant to Rule 11.4, Etheric filed motions for leave to file confidential materials under seal.

11. On February 7, 2020, the FCC adopted the RDOF Order program to build broadband and voice capable networks in rural and unserved/underserved communities.

12. On December 7, 2020, the FCC issued a Public Notice announcing the winning bidders for the RDOF Phase I Auction 904. Etheric is among the 15 bidders that provisionally won RDOF awards in California.

13. Winning RDOF bidders must obtain an ETC designation in the state(s) where they seek support in order to receive federal funding.

14. Etheric's proposed buildout to provide voice and broadband service to 64,463 locations in line with RDOF build requirements is not feasible given the present size of the Etheric service area, and its ~~management, or its operating~~operational, financial, and technical capabilities.

15. Etheric's RDOF award of \$248,634,963 appears insufficient to construct and operate a telecommunications and broadband capable network serving up to 64,463 new locations within the state of California.

16. Granting an ETC designation to Etheric at this time is not in the public interest.

### **Conclusions of Law**

1. Pursuant to Pub. Util. Code § 1001, the Commission has authority to determine whether Etheric has met requirements for issuance of a CPCN to operate as a local exchange carrier.

2. Etheric should be granted a CPCN to provide (i) full facilities-based and resold competitive local exchange services in the service territories of AT&T California, Frontier California, Frontier Communications, Consolidated Communications, (ii) full facilities-based and resold interexchange services in California, (iii) broadband internet and voice-over-internet service\subject to the terms and conditions set forth in the Ordering Paragraphs.

3. Etheric should be allowed to use the Energy Division 21-day CEQA exemption process.

4. Etheric is a telephone corporation and a public utility subject to the Commission's jurisdiction as defined in Pub. Util. Code § 234(a) and § 216(a).

5. Once granted a CPCN, Etheric should be subject to the applicable Commission rules, decisions, GOs, and statutes that pertain to California public utilities.

6. Etheric should be granted an exemption from the requirement to file tariffs at this time.

7. Should Etheric decide to offer services that require a tariff or schedule in the future, Etheric must submit proposed tariffs and/or user guides to the Communications Division via Tier 2 Advice Letters using the GO 96-B Advice Letter process before initiation of service.

8. Etheric's motions to file its Exhibits F,G,H, I, J, N and V1 to the Application, and Exhibits A, B, C, D and E to its April 19 Response to the March 21, 2021 ALJ Ruling, should be granted pursuant to the Ordering Paragraphs herein.

~~9. — All exhibits to Etheric's October 3, 2022 Opening Comments, both the public version and the confidential version, should be stricken from the record.~~

~~10. — Etheric's October 3, 2022 motion for confidential treatment of confidential Exhibits B, C, F, H, I and J should be denied.~~

~~11. — The Commission should not approve confidential treatment of the confidential version of Etheric's October 3, 2022 Opening Comments.~~

9. ~~12.~~ Etheric should be granted non-dominant carrier status, subject to Commission rules and regulations as detailed in D.85-01-008 and modified in D.85-07-081 and D.85-11-044.

10. ~~13.~~ Etheric's request for a limited exemption from Pub. Util. Code § 851 regarding the transfer or encumbrance of utility assets to secure debt should be granted.

11. ~~14.~~ Etheric should obtain a performance bond of at least \$25,000 in accordance with D.13-05-035 and submit it to the Commission within five days of accepting CPCN authority.

12. ~~15.~~ The Commission has broad authority to grant or deny requests for designation of ETC status, pursuant to Resolution T-17002, and in accordance with the federal delegation of authority set forth in the Communications Act in 47 U.S.C. § 214.

13. ~~16.~~ The Commission has authority to evaluate whether it is in the public interest to deny an ETC designation to Etheric after taking into account

deficiencies within its existing financial, technical and operational expertise that would affect Etheric's ability to carry out the RDOF build.

14. ~~17.~~ Etheric's request for ETC designation should be denied.

## O R D E R

### IT IS ORDERED that:

1. A certificate of public convenience and necessity is granted to Etheric Communications, LLC to operate as a non-dominant interexchange carrier and to operate as a competitive local exchange carrier to provide (i) full facilities-based and resold competitive local exchange services in the territories of Pacific Bell Telephone Company d/b/a AT&T California, Frontier California Inc., Citizens Telecommunications Company of California, Inc. d/b/a/ Frontier Communications of California, and Consolidated Communications of California Company, (ii) full facilities-based and resold interexchange services in California, and (iii) broadband internet and voice-over-internet service in California, subject to the terms and conditions in this decision.

2. The request of Etheric Communications, LLC to be designated as an Eligible Telecommunications Carrier is denied without prejudice.

3. The corporate identification number assigned to Etheric Communications, LLC, U7401C, must be included in the caption of all original filings with this Commission, and in the titles of other pleadings filed in existing cases.

4. ~~3.~~ Etheric Communications, LLC must file, in this docket, a written acceptance of the certificate of public convenience and necessity granted in this proceeding within 30 days of the effective date of this decision. Written acceptance filed in this docket does not reopen the proceeding.

5. ~~4.~~ The certificate granted by this decision will expire if not exercised within 12 months of the effective date of this decision. If the applicant requires

additional time to commence service, applicant must submit a request for an extension of time to comply with a Commission decision by e-mail or letter to the Executive Director at least five business days before the existing date for compliance pursuant to Rule 16.6 of the Commission's Rules of Practice and Procedure.

6. ~~5.~~ Etheric Communications LLC must notify the Director of the Communications Division of the date that competitive local exchange service is first rendered to the public, no later than five days after service first begins, by e-mail to [cdcompliance@cpuc.ca.gov](mailto:cdcompliance@cpuc.ca.gov).

7. ~~6.~~ Etheric Communications, LLC must obtain a performance bond of at least \$25,000 in accordance with Decision 13-05-035. The performance bond must be a continuous bond (i.e., there is no termination date on the bond) issued by a corporate surety company authorized to transact surety business in California, and the Commission must be listed as the obligee on the bond. Within five days of acceptance of its certificate of public convenience and necessity authority, Etheric Communications, LLC must submit a Tier-1 Advice Letter to the Communications Division, containing a copy of the license holder's executed bond, and submit a Tier-1 Advice Letter annually, but not later than March 31 of each year, with a copy of the executed bond.

8. ~~7.~~ Etheric Communications, LLC must not allow its performance bond to lapse during any period of its operation. Pursuant to Decision 13-05-035, the Commission may revoke a certificate of public convenience and necessity if a carrier is more than 120 days late in providing the Communications Division a copy of its executed performance bond and the carrier has not been granted an extension of time by the Communications Division.

9. ~~8.~~ In addition to all the requirements applicable to competitive local exchange carriers and interexchange carriers included in Attachments B, C, and D to this decision, Etheric Communications, LLC is subject to the Consumer Protection Rules contained in General Order (GO)168, and all applicable Commission rules, decisions, GOs, and statutes that pertain to California public utilities.

10. ~~9.~~ Etheric Communications, LLC must report intrastate revenue and pay the resulting public purpose program surcharges specified in Attachment B monthly, through the Commission's proprietary Telecommunications and User Fee Filing System (TUFFS) even if there are no revenues (\$0) and resulting surcharges to report and remit. Communications Division must issue a compliance directive to Etheric Communications, LLC, providing directions for reporting and remitting surcharges and the User Fee through the TUFFS system.

11. ~~10.~~ Prior to initiating service, Etheric Communications, LLC must: (a) provide the Commission's Consumer Affairs Branch with the name(s), address(es), e-mail address, and telephone number(s) of its designated contact person(s) for purposes of resolving consumer complaints. This information must be updated if the name(s), address(es), or telephone number(s) change, or at least annually, and (b) must provide the Commission's Communications Division with the name(s), address(es), e-mail address, and telephone number(s) of its designated regulatory/official contact person(s). This information must be provided electronically, using the "Contact Information Request Update" form at <https://www.cpuc.ca.gov/industries-and-topics/internet-and-phone> under Service Provider Requirements and Programs. This information must be updated if the name or telephone number changes, or at least annually by June 1 of each calendar year.



~~12.11.~~ 12. Etheric Communications, LLC must submit, on a calendar year basis:  
(a) an affiliate transaction report to the Director of the Communications Division, by e-mail to [cdcompliance@cpuc.ca.gov](mailto:cdcompliance@cpuc.ca.gov), in compliance with Decision 93-02-019 using the form contained in Attachment D, and annual report to the Director of the Communications Division, by e-mail to [cdcompliance@cpuc.ca.gov](mailto:cdcompliance@cpuc.ca.gov), in compliance with General Order 104-A with the information contained in Attachment C to this decision.

~~13.12.~~ 13. The staff of the Commission's Energy Division is authorized to review, process, and act upon Etheric Communication, LLC's requests for a determination that its full facilities-based construction activities are exempt from the requirements of the California Environmental Quality Act.

~~14.13.~~ 14. Should Etheric Communications, LLC engage in full facilities-based construction activities and believes that these activities are exempt from California Environmental Quality Act (CEQA), Etheric Communications, LLC shall first apply to the Commission's Energy Division staff for a determination of exemption from CEQA by providing the Commission's Energy Division with:

1. A detailed description of the proposed project, including:

1. Customer(s) to be served;
2. The precise location of the proposed construction project; and
3. Regional and local site maps.

~~b.~~ b. A description of the environmental setting, including at a minimum:

- ~~i.~~ i. Cultural, historical, and paleontological resources;
2. Biological resources; and
3. Current land use and zoning.

c. A construction workplan, including:

1. Commission Preconstruction Survey Checklist-Archaeological Resources;
  2. Commission Preconstruction Survey Checklist-Biological Resources;
  3. A detailed schedule of construction activities, including site restoration activities;
  4. A description of construction/installation techniques;
  5. A list of other agencies contacted with respect to siting, land use planning, and environmental resource issues, including contact information; and
  6. A list of permits required for the proposed project.
- d. A statement of the CEQA exemption(s) claimed to apply to the proposed project; and
  - e. Documentation supporting the finding of exemption from CEQA.
  - f. The Energy Division will then review the submittal and notify Etheric Communications, LLC of either its approval or its denial of the claim for exemption from CEQA review within 21 days from the time that Etheric Communication, LLC's submittal is complete.

~~14.~~15. If the Energy Division approves Etheric Communications, LLC's claimed California Environmental Quality Act (CEQA) exemption(s), the staff shall prepare a Notice to Proceed and file a Notice of Exemption with the State Clearinghouse, Office of Planning and Research. If the Energy Division does not approve the claimed exemption, the staff shall issue to Etheric Communications, LLC a letter which states the specific reasons that the claimed CEQA exemptions do not apply to the proposed project. Upon disapproval, Etheric Communications, LLC shall either re-design the specific project and facilities and then reapply for a finding of exemption from CEQA, or file a formal application with the Commission seeking the requisite approval and full CEQA review,

before commencing any full facilities-based construction activities.

~~15.~~16. Etheric Communications, LLC is granted an exemption from the requirement to file tariffs at this time. In the future, if Etheric Communications, LLC decides to offer services that require a tariff, such as basic service, Etheric Communications, LLC must submit proposed tariffs and/or user guides to the Communications Division via Tier 2 Advice Letters using the General Order 96-B Advice Letter process 30 days before initiation of service.

~~16.~~17. Etheric Communications, LLC's request for a limited exemption from Public Utilities Code § 851 regarding the transfer or encumbrance of utility assets to secure debt is granted.

~~17.~~18. Etheric Communications, LLC's motions to file under seal its Exhibits F, G, H, I, J, N and V1 to the Application, and Exhibits A, B, C, D and E to its April 19 Response to the March 21, 2021 Administrative Law Judge (ALJ) Ruling are granted for a period of three years after the date of this decision. During this three-year period, this information shall not be publicly disclosed except on further Commission order or ALJ ruling. If Etheric Communications, LLC believes that it is necessary for this information to remain under seal for longer than three years, it may file a new motion showing good cause for extending this order by no later than 30 days before the expiration of this order.

~~18. — All exhibits to Etheric Communication, LLC's October 3, 2022 Opening Comments are stricken from the record.~~

~~19. — Etheric Communication, LLC's October 3, 2022 motion for confidential treatment of confidential Exhibits B, C, F, H, I and J is denied.~~

~~20. — Confidential treatment of the confidential version of Etheric Communication, LLC's October 3, 2022 Opening Comments is~~19. All motions which have not been ruled upon prior to this decision are deemed denied.

~~21.~~ Application 21-01-002 is closed.

This order is effective today.

Dated \_\_\_\_\_, at San Francisco, California.

**ATTACHMENT A**

This attachment is intentionally left blank.

**(END OF ATTACHMENT A)**

**ATTACHMENT B****REQUIREMENTS APPLICABLE TO COMPETITIVE LOCAL EXCHANGE CARRIERS AND INTEREXCHANGE CARRIERS**

1. Applicant must file, in this docket with reference to this decision number,<sup>1</sup> a written acceptance of the certificate granted in this proceeding within 30 days of the effective date of this order.

2. The certificate granted and the authority to render service under the rates, charges, and rules authorized will expire if not exercised within 12 months of the date of this decision.

3. Applicant is subject to the following fees and surcharges that must be regularly remitted. Per the instructions in Exhibit E to Decision (D.) 00-10-028, carriers authorized to operate in California shall report intrastate revenue and remit the resulting public purpose program surcharges specified as follows monthly, through the Commission's proprietary Telecommunications and User Fee Filing System (TUFFS) even if there is no intrastate revenue (\$0) and resulting surcharges to report and remit. Communications Division shall issue a compliance directive to the carrier's primary contact, providing directions for reporting and remitting surcharges and the User Fee through TUFFS.

- a. The Universal Lifeline Telephone Service Trust  
Administrative Committee Fund (Pub. Util. Code § 277);
- b. The California Relay Service and Communications Devices  
Fund (Pub. Util. Code § 2881; D.98-12-073);
- c. The California High-Cost Fund-A (Pub. Util. Code § 275.6);  
D.96-10-066, at 3-4, App. B, Rule 1.C);
- d. The California High-Cost Fund-B (Pub. Util. Code § 276.5),  
D.96-10-066, at 191, App. B, Rule 6.F.; D.07-12-054);
- e. The California Advanced Services Fund (Pub. Util. Code §  
281; D.07-12-054);
- f. The California Teleconnect Fund (Pub. Util. Code § 280;  
D.96-10-066, at 88, App. B, Rule 8.G);

<sup>1</sup> Written acceptance filed in this docket does not reopen the proceeding.

- g. The User Fee provided in Pub. Util. Code §§ 431-435. The minimum annual User Fee is \$100, as set forth in D.13-05-035.

Note: These fees change periodically. In compliance with Resolution T-16901, December 2, 2004, Applicant must check the joint tariff for surcharges and fees filed by Pacific Bell Telephone Company (d/b/a AT&T California) and apply the current surcharge and fee amounts in that joint tariff on end-user bills until further revised. Current and historical surcharge rates can be found at

<https://www.cpuc.ca.gov/industries-and-topics/internet-and-phone/telecommunications-surcharges-and-user-fees/surcharge-rates>.

- i. Carriers must report and remit CPUC telephone program surcharges online using the CPUC TUFFS. Information and instructions for online reporting and payment of surcharges are available at <https://www.cpuc.ca.gov/industries-and-topics/internet-and-phone/telecommunications-surcharges-and-user-fees>. To request a user ID and password for TUFFS online filing and for questions, please e-mail [Telcosurcharge@cpuc.ca.gov](mailto:Telcosurcharge@cpuc.ca.gov).
- ii. Carriers must submit and pay the PUC User Fee (*see* Item 3.g above) quarterly, through the Commission's TUFFS system within 15 days after the end of each calendar quarter (December 31, March 31, June 30 and September 30) and by the 30<sup>th</sup> day after the 15-day reporting and payment requirement to avoid a one-time 25% penalty. For questions regarding the User Fee, please e-mail [userfees@cpuc.ca.gov](mailto:userfees@cpuc.ca.gov).

4. If Applicant is a competitive local exchange carrier, the effectiveness of its future competitive local exchange carrier tariffs is subject to the requirements of General Order 96-B and the Telecommunications Industry Rules (D.07-09-019).

5. If Applicant is a non-dominant interexchange carrier, the effectiveness of its future non-dominant interexchange carrier tariffs is subject to the requirement of General Order 96-B and the Telecommunications Industry Rules (D.07-09-019).

6. Tariff filings must reflect all fees and surcharges to which Applicant is subject, as reflected in Item 3 above.

7. Applicant must obtain a performance bond of at least \$25,000 in accordance with Decision 13-05-035. The performance bond must be a continuous bond (*i.e.*, there is no termination date on the bond) issued by a corporate surety company authorized to transact surety business in California, and the Commission must be listed as the obligee on the bond. Within five days of acceptance of its certificate of public convenience and necessity authority, Applicant must submit a Tier-1 Advice Letter to the Communications Division, containing a copy of the license holder's executed bond, and submit a Tier-1 Advice Letter annually, but not later than March 31, with a copy of the executed bond.

8. Applicant must not allow its performance bond to lapse during any period of its operation. Pursuant to Decision 13-05-035, the Commission may revoke a certificate of public convenience and necessity if a carrier is more than 120 days late in providing the Communications Division a copy of its executed performance bond and the carrier has not been granted an extension of time by the Communications Division.

9. Applicants providing local exchange service must submit a service area map as part of their initial tariff to the Communications Division.

10. Prior to initiating service, Applicant must provide the Commission's Consumer Affairs Branch with the name(s), address(es), e-mail address(es) and telephone number(s) of its designated contact person(s) for purposes of resolving consumer complaints. This information must be provided electronically, using the "Contact Information Request Update" form found at <https://www.cpuc.ca.gov/industries-and-topics/internet-and-phone> under Service Provider Requirements and Programs. This information must be updated if the name(s), address(es), and telephone number(s) change, or at least annually by June 1 of each calendar year.

11. In addition, Applicant must provide the Commission's Communications Division with the name(s), address(es), and telephone number(s) of its designated regulatory/official contact persons(s). This information must be provided electronically, using the "Contact Information Request Update" form found at <https://www.cpuc.ca.gov/industries-and-topics/internet-and-phone> under Service Provider Requirements and Programs. This information must be updated if the name(s), address(es), and telephone number(s) change, or at least annually by June 1 of each calendar year.

12. Applicant must notify the Director of the Communications Division, in writing submitted by e-mail to [cdcompliance@cpuc.ca.gov](mailto:cdcompliance@cpuc.ca.gov), no later than five days after service first begins, of the date that local exchange service is first rendered to the public.



13. Applicant must keep its books and records in accordance with the Generally Accepted Accounting Principles.

14. In the event Applicant's books and records are required for inspection by the Commission or its staff, it must either produce such records at the Commission's offices or reimburse the Commission for the reasonable costs incurred in having Commission staff travel to its office.

15. Applicant must submit an annual report to the Director of the Communications Division at [cdcompliance@cpuc.ca.gov](mailto:cdcompliance@cpuc.ca.gov), in compliance with GO 104-A, on a calendar-year basis with the information contained in Attachment C to this decision.

16. Applicant must submit an affiliate transaction report to the Director of the Communications Division at [cdcompliance@cpuc.ca.gov](mailto:cdcompliance@cpuc.ca.gov), in compliance with D.93-02-019, on a calendar-year basis using the form contained in Attachment D.

17. Applicant must ensure that its employees comply with the provisions of Pub. Util. Code § 2889.5 regarding solicitation of customers.

18. Within 60 days of the effective date of this order, Applicant must comply with Pub. Util. Code § 708, Employee Identification Cards, and notify the Director of the Communications Division of its compliance in writing, by e-mail to [cdcompliance@cpuc.ca.gov](mailto:cdcompliance@cpuc.ca.gov).

19. If Applicant is 90 days or more late in submitting an annual report, or in remitting the surcharges and fee listed in #3 above, and has not received written permission from the Communications Division to file or remit late: the Communications Division must issue a citation pursuant to Resolution T-17601. Failure to comply with the issued citation or timely appeal the citation may result in a revocation of the company's operating authority and/or a referral to the CPUC Consumer Protection and Enforcement Division (CPED) for enforcement action, which could result in additional fines, penalties, or other sanctions.

20. Applicant is exempt from Rule 3.1(b) of the Commission's Rules of Practice and Procedure.

21. Applicant is exempt from Pub. Util. Code §§ 816-830.

22. If Applicant decides to discontinue service or file for bankruptcy, it must immediately notify the Communications Division's Bankruptcy Coordinator.

23. Applicant must send a copy of this decision to concern local permitting agencies no later than 30 days from the date of this order.

**(END OF ATTACHMENT B)**

## ATTACHMENT C ANNUAL REPORT

In addition to the annual reports requirement pursuant to General Order 104-A, submit the following information electronically via e-mail to [cdcompliance@cpuc.ca.gov](mailto:cdcompliance@cpuc.ca.gov) no later than March 31st of the year following the calendar year for which the annual report is submitted.

Failure to submit this information on time may result in a penalty as provided for in Pub. Util. Code §§ 2107 and 2108.

1. Required information: Exact legal name and U # of the reporting utility.
2. Address.
3. Name, title, address, and telephone number of the person to be contacted concerning the reported information.
4. Name and title of the officer having custody of the general books of account and the address of the office where such books are kept.
5. Type of organization (*e.g.*, corporation, partnership, sole proprietorship, etc.).  
If incorporated, specify:
  - a. Date of filing articles of incorporation with the Secretary of State.
  - b. State in which incorporated.
6. Number and date of the Commission decision granting the Certificate of Public Convenience and Necessity.
7. Date operations were begun.
8. Description of other business activities in which the utility is engaged.
9. List of all affiliated companies and their relationship to the utility. State if affiliate is a:
  - a. Regulated public utility.
  - b. Publicly held corporation.
10. Balance sheet as of December 31st of the year for which information is submitted.
11. Income statement for California operations for the calendar year for which information is submitted.
12. Cash Flow statement as of December 31st of the calendar year for which information is submitted, for California operations only.

For any questions concerning this report, please send an e-mail to [cdcompliance@cpuc.ca.gov](mailto:cdcompliance@cpuc.ca.gov) with a subject line that includes: "CD Annual Reports."

**(END OF ATTACHMENT C)**

**ATTACHMENT D**  
**CALENDAR YEAR AFFILIATE TRANSACTION REPORT**

Submit the following information electronically via e-mail to [cdcompliance@cpuc.ca.gov](mailto:cdcompliance@cpuc.ca.gov) no later than May 1st of the year following the calendar year for which the annual affiliate transaction report is submitted.

1. Each utility must list and provide the following information for each affiliated entity and regulated subsidiary that the utility had during the period covered by the Annual Affiliate Transaction Report.

- Form of organization (*e.g.*, corporation, partnership, joint venture, strategic alliance, etc.);
- Brief description of business activities engaged in;
- Relationship to the utility (*e.g.*, controlling corporation, subsidiary, regulated subsidiary, affiliate);
- Ownership of the utility (including type and percent ownership)
- Voting rights held by the utility and percent; and
- Corporate officers.

2. The utility must prepare and submit a corporate organization chart showing any and all corporate relationships between the utility and its affiliated entities and regulated subsidiaries in #1 above. The chart must have the controlling corporation (if any) at the top of the chart, the utility and any subsidiaries and/or affiliates of the controlling corporation in the middle levels of the chart, and all secondary subsidiaries and affiliates (*e.g.*, a subsidiary that in turn is owned by another subsidiary and/or affiliate) in the lower levels. Any regulated subsidiary must be clearly noted.

3. For a utility that has individuals who are classified as “controlling corporations” of the competitive utility, the utility must only report under the requirements of #1 and #2 above any affiliated entity that either (a) is a public utility or (b) transacts any business with the utility filing the annual report excluding the provision of tariff services.

4. Each annual report must be signed by a corporate officer of the utility stating under penalty of perjury under the laws of the State of California (CCP 2015.5) that the annual report is complete and accurate with no material omissions.

5. Any required material that a utility is unable to provide must be reasonably described and the reasons the data cannot be obtained, as well as the efforts expended to obtain the information, must be set forth in the utility’s

Annual Affiliate Transaction Report and verified in accordance with Section I-F of Decision 93-02-019.

6. Utilities that do not have affiliated entities must submit, in lieu of the annual transaction report, an annual statement to the Commission stating that the utility had no affiliated entities during the report period. This statement must be signed by a corporate officer of the utility, stating under penalty of perjury under the laws of the State of California (CCP 2015.5) that the annual report is complete and accurate with no material omissions.

For any questions concerning this report, please send an e-mail to [cdcompliance@cpuca.ca.gov](mailto:cdcompliance@cpuca.ca.gov) with a subject line that includes: "CD Annual Reports."

**(END OF ATTACHMENT D)**

Document comparison by Workshare Compare on Wednesday, December 14, 2022 1:13:01 PM

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